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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARKET LOFTS COMMUNITY ASSOCIATION, Plaintiff and Appellant, v. 9TH STREET MARKET LOFTS, LLC et al., Defendants and Appellants.	B280446 (c/w B282412) (Los Angeles County Super. Ct. No. BC472621)

APPEALS from orders and a judgment of the Superior Court of Los Angeles County. Richard Edward Rico, Judge. Affirmed.

Freeman, Freeman & Smiley, Todd M. Lander and Arash Beral for Plaintiff and Appellant.

Law Offices of Stephen D. Marks, Stephen D. Marks; Connolly & Finkel and Alan H. Finkel for Defendants and Appellants 9th Street Market Lofts, LLC; 645 9th Street, LLC, The Lee Group, Inc., Jeffrey Lee, Michael Adler, and David Magdych.

Katten Muchin Rosenman, Gregory S. Korman, Leah E.A. Solomon and Charlotte S. Wasserstein for Defendants and Appellants CIM/830 S. Flower, LLC, CIM/Market at 9th & Flower, LLC, CIM/8th & Hope, LLC, and CIM Group, LP.

In this appeal, plaintiff Market Lofts Community Association (HOA), "the homeowner's association for the condominium owners at a mixed-use upscale development called Market Lofts," (*Market Lofts Community Assn. v. 9th Street Market Lofts, LLC* (2014) 222 Cal.App.4th 924, 927 (*Market Lofts*)) challenges the summary judgment entered against it and in favor of defendants.[1] As set forth in the HOA's opening brief,

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[1] As set forth in our prior opinion, defendants "are essentially two sets of developers—the developer of Market Lofts (referred to as 9th Street) and the developer of an adjacent parking structure that contains 319 parking spaces for the Market Lofts condominium owners (referred to as CIM)." (*Market Lofts*, *supra*, 222 Cal.App.4th at p. 927.) Consistent with our prior opinion, defendants sometimes "shall be referred to

the "linchpin" of this litigation is the Parking License Agreement (PLA) between 9th Street Market Lofts, LLC, and CIM/8th & Hope, LLC. According to the HOA, the PLA required 9th Street to assign to the HOA the right to fee-free parking in perpetuity. According to defendants, only 9th Street was granted fee-free parking during construction; 9th Street and CIM always intended to charge the homeowners for parking once the project was completed and units were sold.

Applying well-established rules of contract interpretation, we conclude that the trial court properly granted defendants' motions for summary judgment. Accordingly, we affirm the judgment in favor of defendants on the second amended complaint (SAC) and the award of costs to defendants.

In their separate appeals, 9th Street and CIM challenge the trial court's orders denying their motions for attorney fees. We affirm those orders as well.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Factual Background*

In the early 2000's, the Developers sought to develop the mixed-use upscale project. "The project is the result of a joint development between the 9th Street Respondents, who constructed the condominiums, and the CIM Respondents, who built the accompanying garage that serves the residents and

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collectively as 'the Developers.' 9th Street consists of respondents 9th Street Market Lofts, LLC; 645 9th Street, LLC; and the Lee Group, Inc. CIM consists of CIM/830 S. Flower, LLC; CIM Market at 9th & Flower, LLC; CIM/8th & Hope, LLC; and CIM Group, L.P. Respondents also include Jeffrey Lee (Lee); Michael Adler (Adler); and David Magdych (Magdych)." (*Market Lofts*, *supra*, at p. 927, fn. 1.)

street-level retail stores." Because sufficient parking in downtown Los Angeles was an issue, the Developers needed to assure all entities associated with the project (from the City of Los Angeles to Bank of America, the lender) that adequate parking would be provided to the homeowners of the soon to be constructed residential units.

Thus, on May 11, 2006, 9th Street and CIM entered into the PLA. The PLA provides that the project will include "a residential condominium project." It also provides that CIM will "construct and deliver to Market Lofts 319 parking spaces." Furthermore, CIM "agreed to grant to Market Lofts for the benefit of the [HOA] to be formed in connection with the sale of residential condominium units in the Market Lofts Project and the owners and occupants of the residential units to be located in the Market Lofts Project, a license to use the Market Lofts Parking Spaces, which shall be appurtenant to the Market Lofts Property."

Paragraph 2.1 of the PLA provides, in relevant part: "[CIM] hereby grants to Market Lofts, for the use of Permitted Users, a perpetual license (a) for exclusive use of the Market Lofts Parking Spaces to be located in the Parking Structure for the purpose of parking Authorized Vehicles . . . . The licenses granted to Market Lofts and the other Permitted Users with respect to the Market Lofts Parking Spaces shall be at no cost to Market Lofts, except for the obligation to pay its Proportionate Share of CAM Charges in accordance with Section 2.2."[2]

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[2] "CAM" stands for common area maintenance. (*Market Lofts*, *supra*, 222 Cal.App.4th at p. 928.)

Paragraph 13 of the PLA provides, in relevant part: "Upon the First Closing, Market Lofts shall assign or sub-license its rights and obligations under this Agreement to the HOA. . . . [T]he terms and conditions of this Agreement shall be covenants that run with the land and shall be binding on and shall inure to the benefit of the parties and their respective heirs, executors, administrators, guardians, custodians, successors and assigns and any reference to Market Lofts or Developer contained herein shall be deemed to include Market Lofts or Developer, as the case may be, and its permitted successors and assigns."

On January 10, 2007, the HOA was formed. On January 24, 2007, the HOA entered into a parking sublicense and agreement (the sublicense agreement) with 9th Street. The sublicense agreement requires the HOA to pay a specified fee for each parking space. "At that time, respondents Lee, Adler and Magdych comprised a 'controlling majority' of the HOA's board of directors." (*Market Lofts*, *supra*, 222 Cal.App.4th at p. 928.)

II. *Procedural Background*

A. The Pleadings

The HOA initiated this lawsuit on November 1, 2011. On August 22, 2012, it filed its SAC, the operative pleading. The SAC asserts claims for declaratory relief (counts 1 & 2), breach of fiduciary duty, breach of contract, concealment, unfair business practices, and rescission.

The Developers demurred to the SAC. On October 11, 2012, the trial court sustained the demurrer without leave to amend on the grounds that the HOA lacked standing to sue.

On January 7, 2014, we reversed the trial court's order, finding that the HOA did have standing to bring the claims asserted in the SAC.[3] (*Market Lofts*, *supra*, 222 Cal.App.4th at pp. 931–932.)

B. Summary Adjudication/Judgment

On November 2, 2015, 9th Street filed a motion for summary adjudication. Because of procedural deficiencies in the motion, the trial court continued the hearing in order to allow 9th Street to file an amended motion.

On April 20, 2016, 9th Street filed an amended motion for summary adjudication, directed to the first, second, third, fifth, and sixth causes of action in the SAC. After the motion was fully briefed, on June 9, 2016, the trial court issued its ruling, granting

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[3] While that appeal was pending, defendants moved for attorney fees on the grounds that (1) the HOA failed to comply with the mediation provision of the PLA prior to initiating this lawsuit, and (2) the attorney fee provision of the PLA grants attorney fees to the prevailing party. Although the trial court found that the HOA did not comply with the PLA's prelitigation dispute resolution procedures, defendants were still not entitled to recover attorney fees because the attorney fee provision in the PLA is not reciprocal. "Under the law, the reciprocal right to attorney's fees in [Civil Code] Section 1717 cannot be enforced against a non-signatory to a contract unless it is clear that if the non-signatory party had prevailed, he/she/it would have been entitled to enforce the contractual attorney's fees provision. [Citations.] . . . [¶] Here, [the HOA] is not a signatory to the PLA" and had the HOA prevailed, it would not have been entitled to recover its attorney fees. Thus, defendants could not recover their attorney fees from the HOA even though (at that time) defendants had prevailed by the trial court's dismissal of the HOA's SAC.

9th Street's amended motion for summary adjudication as to the first, second, and fourth causes of action. In particular, it found nothing in the PLA that prohibited 9th Street from charging for parking. To the extent the PLA was ambiguous, the trial court considered extrinsic evidence of the parties' intent, and found undisputed evidence that the parties always intended to charge for parking. In so ruling, the trial court rejected the HOA's claim that the extrinsic evidence was barred by the parol evidence rule. "In sum the undisputed evidence shows that there is no material breach under the contract." "Alternatively, the evidence shows that the parties to the PLA never intended to give free parking."

Shortly thereafter, on July 21, 2016, all of the defendants filed a consolidated motion for summary judgment, seeking judgment on all causes of action leveled against them, based upon the trial court's June 9, 2016, order, as well as on the grounds of statute of limitations. On October 6, 2016, the trial court granted that motion for summary judgment on the grounds set forth in its June 9, 2016, ruling.

Judgment was entered in favor of the Developers and against the HOA, and the HOA timely appealed.

C. Attorney Fees

The Developers then moved for attorney fees.

1. *9th Street's Motion*

Presumably because its request for attorney fees pursuant to the PLA had been denied, 9th Street moved for attorney fees pursuant to paragraph 17.4 of the sublicense agreement. That section provides, in relevant part: "In the event any action, proceeding, mediation or arbitration is brought by either party against the other under this Agreement, the prevailing party shall be entitled to recover from the other party all costs and

expenses including the fees and disbursements of its attorneys in such action or proceeding (including on appeal) in such amount as the court, the mediators or the arbitrators, as the case may be, may adjudge reasonable, which amount shall be determined without regard to any predetermined schedule of fees." According to 9th Street, because the HOA's claims were based upon the sublicense, they are entitled to recoup their attorney fees.

9th Street sought $355,843 in attorney fees.

After entertaining oral argument, the trial court denied 9th Street's motion for attorney fees, reasoning that the sublicense agreement "attorney fee provision expressly limits fees to proceedings between Market Lofts and 9th Street *arising* 'under this Agreement.' [Citation.] The gravamen of the instant action is the interpretation of the PLA . . . and the legal question of whether 9th Street Defendants were precluded from charging a sublicense parking fee to [the HOA] or its members *under the PLA*. The [sublicense agreement] is the manifestation of Defendants' alleged breach and not the governing contract." In so ruling, the trial court distinguished *Eden Township Healthcare Dist. v. Eden Medical Center* (2013) 220 Cal.App.4th 418 (*Eden Township*).

9th Street timely appealed the trial court's order denying its request for attorney fees.

2. *CIM's Motion*

CIM separately moved for attorney fees. As it had done in connection with its prior motion for attorney fees, it sought fees under the attorney fee provision set forth in the PLA (section 17.11). That provision provides, in relevant part: "In the event of any legal action taken or proceeding brought to enforce the provisions hereof, each party shall be responsible for its own

attorneys fees and costs, unless the party initiating the action has failed to comply with the mediation/arbitration provisions of Section 16, in which event the other party shall be entitled to recover its attorneys' fees and costs should it prevail." According to CIM, because the HOA did not comply with the terms of section 16 of the PLA before initiating this litigation, the attorney fee provision under the PLA was triggered, rendering the HOA liable for CIM's attorney fees.

Alternatively, the fact that the HOA was not a party to the PLA does not impede CIM's recovery of attorney fees because had the HOA, a nonsignatory to the PLA, prevailed it could have recovered its attorney fees from CIM.[4] In support, CIM relied upon *Brusso v. Running Springs Country Club, Inc.* (1991) 228 Cal.App.3d 92 (*Brusso*).

CIM requested $1,549,383 in attorney fees.

After entertaining oral argument, the trial court denied CIM's motion for attorney fees. It noted that the issue raised in CIM's motion, namely "whether the attorney fee provision in the [PLA] is enforceable by non-signatories [HOA]" was previously decided against CIM. And had the HOA prevailed in this case, it would not have been entitled to attorney fees under the PLA because it was not a party to the PLA. In other words, reciprocity is lacking in the attorney fee provision of the PLA. And, the trial court found CIM's reliance upon *Brusso* unpersuasive.

CIM timely filed a notice of appeal from the order denying its request for attorney fees.

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[4] In making this argument, CIM revisited the prior trial court order denying defendants attorney fees after it sustained defendants' demurrer to the SAC without leave to amend.

DISCUSSION

The HOA's Appeal

I. Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) If, in deciding this appeal, we find there is no issue of material fact, we affirm the summary judgment if it is correct on any legal ground applicable to this case, whether that ground was the legal theory adopted by the trial court or not, and whether it was raised by defendant in the trial court or first addressed on appeal. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481.) If, on the other hand, we find that one or more triable issues of material fact exist, then we must reverse the judgment.

II. The Trial Court Properly Granted Summary Judgment

"'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*,

§ 1638.)" [Citations.]'" (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647–648.)

"When parties dispute the meaning of contractual language, the trial court must provisionally receive extrinsic evidence offered by the parties and determine whether it reveals an ambiguity, i.e., the language is reasonably susceptible to more than one possible meaning. If there is an ambiguity, the extrinsic evidence is admitted to aid the interpretative process. 'When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] . . . If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the [factfinder]. [Citations.]' [Citation.]" (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 376–377; see also *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 72–73.)

Applying these principles, we conclude that there is no triable issue of fact.

Recital C of the PLA provides, in relevant part: "Pursuant to that certain Agreement Regarding Construction of Parking Structure . . . , Developer has agreed to construct and deliver to Market Lofts 319 parking spaces (the 'Market Lofts Parking Spaces') to be located in a parking structure." At Recital D, the PLA provides: "Developer has agreed to grant to Market Lofts for the benefit of the residential homeowner's association (the 'HOA') to be formed in connection with the sale of residential condominium units in the Market Lofts Project, . . . a license to use the Market Lofts Parking Spaces, which shall be appurtenant to the Market Lofts Property."

Paragraph 2.1 continues: "Subject to the terms of this Agreement, Developer hereby grants to Market Lofts, for the use of Permitted Users, a perpetual license (a) for the exclusive use of the Market Lofts Parking Spaces to be located in the Parking Structure for the purpose of parking Authorized Vehicles . . . . The licenses granted to Market Lofts and the other Permitted Users with respect to the Market Lofts Parking Spaces ***shall be at no cost to Market Lofts***, except for the obligation to pay its Proportionate Share of CAM Charges . . . ." (Emphasis added.)

The emphasized portion of paragraph 2.1 confirms that fee-free parking was only provided to Market Lofts. Nothing in the PLA indicates that fee-free parking was provided to the HOA. While PLA provides for parking for the homeowners in the Market Loft development, it says nothing of free parking for those homeowners. Our analysis could stop here.[5]

At best for the HOA, the PLA is ambiguous. After all, paragraph 13 provides, in relevant part, that upon the first closing of the sale of the first condominium unit, "Market Lofts shall assign or sub-license its rights and obligations under this Agreement to the HOA. . . . [T]he terms and conditions of this Agreement shall be covenants that run with the land and shall be binding on and shall inure to the benefit of the parties and their respective heirs, executors, administrators, guardians, custodians, successors and assigns and any reference to Market Lofts or Developer contained herein shall be deemed to include

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[5] It follows that the Developers did not breach the PLA by entering into the 2007 parking sublicense agreement.

Market Lofts or Developer, as the case may be, and its permitted successors and assigns."

According to the HOA, this language compels the conclusion that upon the first closing, Market Lofts was required to assign all of its rights under the PLA, including the right to fee-free parking, to the HOA. After all, the language states that Market Lofts "shall assign . . its rights." And "[i]f the Developers were free to convey as little or as much parking rights as they desired, the PLA would effectively be rendered a nullity." But defendants counter that this language does not compel a complete assignment of all rights under the PLA. In support, defendants point to the PLA's alternative language, "shall assign or sub-license," and the term "sub-license" contemplates something less than a total transfer of rights. (See, e.g., *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 492, fn. 2.)

Paragraph 13 is ambiguous and reasonably susceptible to both interpretations. Thus, we turn to extrinsic evidence to determine what the parties intended by this language. And all of the extrinsic evidence confirms that the parties to the PLA never intended the HOA to receive fee-free parking.

The HOA offers no extrinsic evidence regarding the parties' intent at the time the PLA was negotiated.[6] Instead, it attacks the extrinsic evidence on the grounds that it violates the parol evidence rule.

"The parol evidence rule operates to bar extrinsic evidence which contradicts the terms of a written contract. [Citation.] It

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[6] Notably, the HOA does not argue that the trial court improperly granted summary judgment based upon one side's presentation of extrinsic evidence.

'is not a rule of evidence but is one of substantive law. It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the "integration"), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself.' (Italics in original.) [Citations.]" (*Riley v. Bear Creek Planning Committee* (1976) 17 Cal.3d 500, 508–509.)

Given that the PLA is, at best for the HOA, ambiguous, the trial court's consideration of extrinsic evidence did not amount to a violation of the parol evidence rule.

In its appellate briefs and at oral argument, the HOA focuses heavily on Bank of America's interest in the project and its requirement that parking be provided to the HOA and homeowners. In fact, both sides present evidence establishing that adequate parking was a concern in connection with the development. But the HOA points us to no evidence that creates a triable issue of fact that parking had to be fee-free for the condominium owners.[7]

The HOA further argues that the Developers have violated applicable laws, which must be read into the PLA, by charging

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[7] For this reason, we conclude that the PLA was not rendered a nullity by defendants' actions. The HOA still has adequate parking—just not fee-free parking.

the HOA for parking. The HOA directs us to no zoning laws that prohibit the Developers from charging the HOA for parking. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

And its reliance upon Civil Code section 5600 is misplaced. Civil Code section 5600, subdivision (b), provides: "An association shall not impose or collect an assessment or fee that exceeds the amount necessary to defray the costs for which it is levied." An "association" is defined as "a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development." (Cal. Civ. Code, § 4080.) The Developers here do not fall within this statutory definition. Thus, Civil Code section 5600 does not apply to them.

Implicitly recognizing this flaw in their argument, the HOA argues that it is "clear that the Developers and the Association were one and the same—the Association was a mere extension of the Developers—and are therefore subject to [Civil Code section] 5600." Case law holds otherwise. (See, e.g., *Brown v. Professional Community Management, Inc.* (2005) 127 Cal.App.4th 532, 538–540 [holding that the duty to refrain from the statutorily prohibited conduct is imposed solely on the association, the nonprofit entity designated by statute, not the association's vendors]; *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1552.)

In light of our analysis set forth above, the trial court properly granted summary adjudication of the contract causes of action in favor of defendants (first, second, and fourth causes of action in the SAC). It follows that the Developers did not breach any fiduciary duties (third cause of action in the SAC) in this case; regardless of who were the members of the initial HOA

board, nothing prohibited them from allowing the Developers to charge the HOA for parking.

And, the Developers cannot be liable for the HOA's claim of concealment (fifth cause of action in the SAC). This cause of action is based upon the HOA's allegation that defendants "concealed the representations, covenants and promises that are contained in the [PLA] . . . namely, that the [HOA] and its members would have a perpetual and exclusive license and/or easement for permanent parking spaces . . . [and] this right, easement and/or license was to be at no cost to the [HOA]." Given our conclusion that defendants did not promise fee-free parking in perpetuity in the PLA, defendants cannot be liable for concealing that nonexistent promise.

Because the sixth cause of action in the SAC for unfair business practices is derivative of the other claims, it fails for the same reasons set forth above. (*Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147.)

Finally, the HOA's seventh cause of action for rescission fails. The HOA seeks rescission of the sublicense agreement and restitution of all parking fees paid under that agreement. At the risk of sounding redundant, nothing in the relevant contracts prohibited the Developers from charging for parking. There is no basis to rescind the sublicense agreement and return all parking fees paid thereunder.

III. Defendants are entitled to costs

In one-sentence, the HOA asserts in summary fashion: "Because judgment should never have been entered against the [HOA], the [HOA] respectfully submits that the Court should reverse the Lower Court's ruling awarding costs to the Developers." We reject this argument for the simple reason that

we are affirming the trial court's order granting summary judgment.

Defendants' Appeal

I. Standard of Review

"'"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorneys' fees and costs in this context have been satisfied amounts to statutory construction and a question of law."' [Citation.]" (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

II. The Trial Court Properly Denied Defendants' Motions for Attorney Fees

After careful examination of the relevant contracts, applicable law, and the parties' arguments, we conclude that the trial court rightly denied defendants' motions for attorney fees.

Defendants are not entitled to attorney fees pursuant to the sublicense agreement. As the trial court found, the gravamen of this lawsuit was the PLA and whether it prohibited defendants from charging the eventual owners of the condominium units for parking. The PLA is at the heart of the HOA's claims in the SAC. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 241–242.) And, the interpretation of the PLA was at the core of defendants' motions for summary adjudication and judgment.

Eden Township, *supra*, 220 Cal.App.4th at page 418 does not compel a different result. As noted by the trial court, "*Eden Township* distilled the following principle: 'An action (or cause of action) is "on a contract" for purposes of [Civil Code] section 1717

if (1) the action (or cause of action) "involves" an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement, and (2) the agreement contains an attorney fees clause.' (*Eden Township*, [*supra*], 220 Cal.App.4th at [p.] 427, internal citations omitted.)" Here, the HOA's claims in the SAC turn upon an interpretation of the PLA, not the sublicense agreement. Therefore, *Eden Township* does not apply. (See also *California-American Water Co. v. Marina Coast Water Dist.* (2017) 18 Cal.App.5th 571, 577–578 [applying *Eden Township*].)

Furthermore, defendants are not entitled to attorney fees from the HOA pursuant to the PLA because the HOA was not a signatory to the PLA, and the PLA is not a reciprocal agreement. "Where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." (*Real Property Services Corp. v. City of Pasadena* (1994) 25 Cal.App.4th 375, 382.) Here, had the HOA prevailed, it would not have been entitled to attorney fees (despite its request for such fees) because there is no evidence that the parties to the PLA intended to extend the right to recover attorney fees to the HOA. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 897 (*Blickman*) ["a nonsignatory seeking relief as a third party beneficiary may recover fees under a fee provision only if it appears that *the contracting parties intended* to extend such a right to one in his position"].)

Defendants urge us to ignore *Blickman* and like cases and find, on equitable grounds, that they are entitled to recover their attorney fees. After all, according to defendants, the HOA "stubbornly insisted throughout five years of litigation that it is a 'direct party' to the [PLA]" and, "[o]n that basis . . . filed suit to enforce the terms of the [PLA] and obtain not only $20 million in free parking rights, *but also its attorneys' fees*." Under the circumstances presented in this case, we opt to follow *Blickman* and conclude that equitable principles do not dictate an award of attorney fees here. (*Blickman*, *supra*, 162 Cal.App.4th at pp. 898–900.)

Finally, like the trial court, we reject defendants' contention that had it prevailed, the HOA would have been entitled to attorney fees under a common fund or substantial benefit theory. "[T]he 'common fund doctrine' may be invoked when a number of persons are entitled in common to a specific fund of money and an action brought by a plaintiff results in its recovery or preservation for the benefit of all. . . . [T]he successful plaintiff may be awarded attorneys' fees from the fund involved." (*Mandel v. Hodges* (1976) 54 Cal.App.3d 596, 620.) Similarly, "the 'substantial benefit' rule permits an award of attorneys' fees . . . where (1) the suit is one in which the court's equitable powers come into play; (2) it is commenced and maintained as a representative action; and (3) it results in a disposition that confers substantial benefits, pecuniary or otherwise, upon the persons represented." (*Id*. at p. 622.) "Courts generally apply the common fund and substantial benefit theories to cases involving a distinct class of beneficiaries, among whom the costs of litigation can be fairly spread to prevent the unjust enrichment of class members as the expense of the

successful litigant." (*Cziraki v. Thunder Cats, Inc.* (2003) 111 Cal.App.4th 552, 558, fn. omitted.) According to defendants, "[t]he availability of fees under the common fund or substantial benefit theory supplies the reciprocity required under [Civil Code] Section 1717." In support of this theory, defendants rely upon *Brusso*, *supra*, 228 Cal.App.3d at pages 110 to 111.

We are not convinced by defendants' argument. First, the substantial benefit and common fund doctrines apply in cases of equity. This was not a case in which the court's equitable powers were called into play—rather, this was a straightforward breach of contract action.

Second, we find *Brusso* distinguishable. In finding that the signatory defendants (who prevailed in the litigation) were entitled to recover attorney fees from the nonsignatory plaintiffs (who lost in the underlying action), the *Brusso* court held that "the nonsignatory plaintiffs would have had a right to receive fees under the substantial benefit doctrine had they prevailed. [Citations.] That is, had defendants lost, they would have been liable to plaintiffs for damages and fees under the contract, thereby creating a benefit to the corporation in the form of a common fund from which all plaintiffs could have recovered their fees." (*Brusso*, *supra*, 228 Cal.App.3d at p. 111.) Here, in contrast, had the Developers lost, they would not have been liable to the HOA for attorney fees under the contract.[8] To the extent

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[8] As pointed out by *Blickman*, the *Brusso* attorney fees clause was "very broad," allowing fees to the prevailing party in any litigation arising out of the subject contract. (*Blickman*, *supra*, 162 Cal.App.4th at p. 900.) The attorney fee clause in this case, like the one in *Blickman*, is restricted to parties to the agreement.

defendants contend that *Brusso* holds that the substantial benefit rule creates the reciprocity required for a nonsignatory to be liable for attorney fees to a signatory, we cannot agree. The substantial benefit and common fund rules are equitable theories created for the benefit of a representative entity, like the HOA here. Allowing the Developers to utilize this equitable doctrine to recoup millions of dollars in attorney fees would turn equity on its head.

DISPOSITION

The orders and judgment are affirmed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
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_____, J.
HOFFSTADT